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June 1, 1959

FOR: General Goodpaster

FROM: John A. Calhoun



For information.

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OF CLASSIFIED ATTACHMENTS

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7/12/78

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2012 to Moscow, cy 52
1939 to Moscow, May 21, 1959

Mr. White 6/1/59

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Department of State

1959 MAY 29 PM 9 27

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16615

White House

SENT TO: Amembassy MOSCOW 2012

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RPTD INFO: USEER BERLIN 794
Amconsul GENEVA TOSEC — 150
Amembassy BONN 2871
Amembassy LONDON 10511
Amembassy PARIS 4653

Origin

EUR

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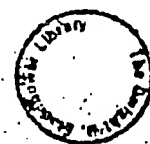
PARIS FOR EMBASSY, USRO, CINCEUR, THURSTON AND WEST

BONN PASS USAF

Our 1939, Your 2354. Our 782 to Berlin, 2813 to Bonn, 10250 to London,
4499 to Paris, TOSEC 96 to Geneva. BERLIN's 990, London's 6160, Paris' 4376
Geneva's SECTO 127.

For Moscow: Delete entire third paragraph text of note contained in
Department's 1939. Deliver note to Ministry Foreign Affairs earliest
convenient opportunity. Department has no present plans publish note.

Dtd.
Desired
(Offices
Only)



ACTING

BERLIN

Drafted by:

Telegraphic transmission and

EUR:GER:GPA:JHM:Farland,Jr:esw 5-29-59 classification approved by: EUR - Foy D. Kohler

Clearance:

EE - Mr. Toon
GER - Mr. Vigderman
S/S - Mr. Borg

L/EUR - Mr. Wehmeyer
G - Mr. Murphy

AV - Mr. van Oss (by phone)

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Department of State

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11267
May 21, 1959

VERBATIM TEXT

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SENT TO: Amembassy MOSCOW 1939

RPTD INFO: USHER BERLIN 782
Amembassy BONN 2813
Amembassy LONDON 10250
Amembassy PARIS 4499
Amconsul GENEVA TOSEC 96

Authority NLE MR 76-166, #17
By 260 NLE Date 7/14/77

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Following is suggested reply to Soviet note 29/OSA of April 28 protesting high altitude flights in Berlin air corridors:

BEGIN TEXT The Embassy of the United States of America has been instructed to reply as follows to the note of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics, No. 29/OSA of April 28, 1959, protesting routine March 27 and April 15, 1959 flights in the Frankfurt-Berlin air corridor by United States aircraft.

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The Government of the United States has noted the views of the Soviet Government concerning the matter of flights in the air corridors between the Federal Republic of Germany and Berlin. The views of the United States Government remain those set forth in the Embassy's note of April 13, 1959.

Inasmuch as the issue in question is one which is susceptible of impartial adjudication, it occurs to the Government of the United States that the

Government



RE: GER: CPA: JEM: Farland, Jr: eaw 5-20-59

Telegraphic transcription of
classification approved by:

EUR - Foy D. Kohler

GER - Mr. Vigderman

EE - Mr. Toon (in draft) I/EUR - Mr. Wehmeyer (in draft)

GER - Mrs. Dulles

BNA - Mr. Swihart (in draft) S/S - Mr. Seip

CPA - Mr. McKiernan

G - Mr. Murphy

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Government of the Union of Soviet Socialist Republics may wish to submit the issue to the International Court of Justice for determination. Should the Soviet Government so desire, the Government of the United States would be prepared to join in such a submission. End Text

Department believes that on balance we would stand to gain regardless of Soviet reaction to suggestion. Highly unlikely Soviet Government would accept our suggestion but putting ourselves on record as willing litigate issue would enhance our position with respect to future Soviet protests on this question.

Following considerations appear relevant:

are

1. We/not proposing take issue to Court but stating that if USSR desires do so we will co-operate. Decision left to USSR Government and it assumes burden of proof in establishing validity its position.

2. If Soviets fail act on our suggestion (as we assume, view their traditional distaste for submitting to ICJ jurisdiction) we would be in improved position in event any future disputes over high altitude corridor flights to tell Soviets that, as we had afforded them opportunity prove their case and they had not chosen do so, we proposed take no further notice their protests.

Soviets

3. Should/take issue to ICJ we feel we have at least 50-50 chance win on merits of case. Soviet arguments before ICJ likely to be based on one of three theories:

a. That as stated their note of April 28 QUOTE there exists definite system and established practice for flights in air corridor over territory of GDR and no one can violate system without agreement of other side UNQUOTE. Valuable to us to have

precedent

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precedent confirming that custom establishes scope and nature of right of access because of its equal applicability to our surface access to Berlin.

b. Soviets might argue that written agreements of quadripartite committees in Berlin indicate 10,000 foot ceiling was placed on corridor flights. This would have advantage for us of having Soviets confirm validity and applicability of quadripartite agreements which they have previously denied or ignored.

c. Pursuing line advanced in their November 27, 1958 note, Soviets might claim Western access rights have been modified or lost because of changed political circumstances such as establishment of QUOTE GER UNQUOTE (rebus sic stantibus). In such event burden on USSR to prove its case would be substantial since doctrine not widely accepted and our case particularly strong. In addition, since November note, Soviets have undermined own theory as result of Khrushchev's press conference statement of March 20 acknowledging western rights be in Berlin. Additionally, language in Soviet note of April 28 reflects fact that as of that date Soviets recognized and applied agreements relating to our air access below 10,000 feet. We could scarcely have more favorable circumstances in which to defend our fundamental position.

Public pressure, which might arise as result referral high flight issue to ICJ, to bring broader Berlin issue to Court could be dealt with by taking position that as we have agreed, view basic political problems involved, to discuss general question of Berlin at Foreign Ministers' meeting and at possible summit conference, referral to Court would be inappropriate. Flight issue, however, which is completely legal dispute can be readily submitted to Court.



Addressees

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Addressees comments invited by May 25. London and Paris provide respective Foreign Offices with texts informing them that since British and French rights might be affected, as well as our own if matter ever actually goes to ICJ, Department is seeking their views concerning the action contemplated.

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